

BEFORE THE  
DEPARTMENT OF AGRICULTURE  
WASHINGTON, D.C.

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PROPOSED TART CHERRY MARKETING ORDER

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) Docket No.: AO-370-A5  
) FV93-930-1  
)

UNITED STATES DEPARTMENT OF JUSTICE  
POST-HEARING MEMORANDUM AND  
PROPOSED FINDINGS OF FACT

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INTRODUCTION

On November 30, 1993, the Department of Agriculture issued a notice of public hearing to consider a proposed federal marketing agreement to cover tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. 58 Fed Reg. 63,108-120. The hearing was devoted almost exclusively to consideration of complex volume-control regulations that would authorize a Cherry Industry Administrative Board to restrict the tart cherry supply by holding tart cherries in mandatory inventory reserves or by diverting them to "non-market uses," which would often mean destroying the tart cherries at handlers' facilities. The

program would be funded by mandatory assessments levied on tart cherry handlers. The hearing is now complete.<sup>1/</sup>

#### POSITION OF THE DEPARTMENT OF JUSTICE

The Department of Justice opposes the proposal to allow a Cherry Industry Administrative Board artificially to restrict the tart cherry supply. The costs of the proposal clearly exceed its benefits. The proposed volume restrictions would impose hundreds of millions of dollars of overcharges on consumers and result in economic waste and inefficiency by destroying significant portions of the tart cherry crop. There is no reason to impose these costs on consumers and the public. The record shows the tart cherry industry to be a well-functioning, competitive market with many growers and processors who have ready access to high-quality market information and ample opportunities to store their crop as they see fit to hedge against price fluctuations. There was no evidence that this industry has experienced the kind of market

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<sup>1/</sup> Administrative Law Judge Paul Kane conducted the hearing in December of last year and January and February of this year at four sessions in Grand Rapids, Michigan; Rochester, New York; Provo, Utah; and Portland, Oregon. More than 60 witnesses, including 47 tart cherry growers, 8 tart cherry processors, 1 buyer of tart cherries, and 4 economists testified. The record contains 2511 pages and 53 exhibits.

failure that would justify regulation, and therefore no need for order-mandated inventory reserves and diversion programs to "stabilize" prices and supplies.

Furthermore, and contrary to proponents' contention, the proposed order would not even out fluctuations in tart cherry supplies across seasons of surplus and shortfall, and therefore would not stabilize tart cherry prices. Rather, the record demonstrates that the proposed order would restrict the overall tart cherry supply every year, increase tart cherry prices to consumers, and send false signals to growers to expand their output, which under the order would then be destroyed. In short, there exists no problem that the proposed market interference would solve, and implementation of the proposed market order would itself harm the public.

The proposed marketing agreement would also authorize the Cherry Industry Administrative Board to impose minimum quality and inspection requirements on handlers. The Department of Justice opposes these quality controls because they are unnecessary and costly regulations that may also be used by the Board to restrict the tart cherry supply.<sup>2/</sup>

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<sup>2/</sup> The Department of Justice did not examine aspects of the proposed order relating to market research and promotion, and takes no position on that program.

## ANALYSIS

I. The Volume Control Provisions of the Proposed Marketing Order Would Restrict the Available Tart Cherry Supply and Result in Destruction of Significant Portions of the Crop

The proposed marketing order would create a Cherry Industry Administrative Board with power to administer volume-control regulations, subject to approval by the Secretary. The proposed volume controls occur in two steps: A primary inventory reserve first takes available supply off the market by requiring storage of up to 50 million pounds; thereafter "diversion programs" are triggered, the result of which, the evidence shows, is generally crop destruction. Exhibit 37 at §§ 930.30, 930.50-62.3/

The regulations would apply to "handlers" who would incur increased costs averaging \$1.8 million annually in assessments

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3/ The marketing order as originally proposed, together with numerous amendments and proponents' "Section by Section Analysis," are set out in exhibits 6, 16-19, and 35-37. Exhibit 37, which comes closest to describing the proposed order in its entirety, runs for 35 pages. Johnston tr. 1273-74. The proponents' attempts to explain the proposed order filled some 474 pages of the hearing transcript. Johnston tr. 72-89, 107-194, 622-97, 708-756, 776-815, 899-924, 930-986, 991-96, 1120-45, 1180-1217, 1247-1289, 1662-78, 2075-2125, 2476-2508.

to fund the regulations.<sup>4/</sup> "Handlers" are broadly defined in the proposed order to include anyone who brings tart cherries into the current of commerce from a commercially significant tart cherry producing state. Id. at § 930.10-.11. The volume-control regulations would initially apply to the three leading production states of Michigan, Utah, and New York. Id. at § 930.52; exhibit 8 at 21-24.<sup>5/</sup>

On or about July 1 of each crop year, the Board would establish an "optimum supply" level for the crop year, and a "preliminary restricted percentage" of cherries to be withheld from the market. Exhibit 37 at § 930.50(a),(b),(h).<sup>6/</sup>

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<sup>4/</sup> The Board would levy mandatory assessments on all handlers "in an amount designed to secure sufficient funds to cover the expenses which may be incurred" by the Board in any given year. Id. at § 930.41. Proponents estimate that initial assessments could be as high as three-quarters of a cent per pound of all fruit handled. Johnston tr. 89. Given this assessment rate in an average year when handlers sell 240 million pounds of tart cherries, exhibit 8 at 37, the Board would collect \$1.8 million.

<sup>5/</sup> The proposed order would be extended to all handlers in other tart cherry producing states if production in those states met certain conditions. Volume regulations would be extended to Oregon, Pennsylvania, Washington, and Wisconsin if the average annual production of tart cherries over the prior three years in these states either exceeds 15 million pounds or increases by 50% over the average production during the period between 1989 and 1992. Exhibit 37 at § 930.52 (a),(c); exhibit 8 at 21-24. If any other state's production exceeds 5 million pounds, that state will be added to the production area covered by the proposed marketing order. Exhibit 8 at 21.

<sup>6/</sup> A description of the Board's methods for calculating restricted percentages is set forth in the appendix to this memorandum.

Between July 1 and September 15 of each crop year, the Board would modify the preliminary restricted percentage "to adjust to the actual pack occurring in the industry," promptly giving notice to growers and handlers of any such modifications. Id. at § 930.50(c),(h). No later than September 15 of each crop year, the Board would recommend the final restricted percentage to the Secretary for his approval. Id. at § 930.50(d).

Handlers in regulated states would be required to hold their restricted percentage of tart cherries in primary or secondary inventory reserves or to divert them out of the current of commerce, e.g., by contributing the tart cherries to Board-approved food banks, by feeding the tart cherries to animals, or simply by destroying them. Id. at §§ 930.50(i), 930.55-.59.7/ The Board would be required to release tart cherries held in inventory reserves only if the current crop is sufficiently less than the "optimum supply," and even in that situation the Board would release only such volume from the

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7/ Proponents of the proposed order variously referred to inventory reserves as restricted inventories, set asides, and reserve pools. See Johnston tr. 73-88, 1133. Regardless of the nomenclature, the important feature of these reserves is that they would not be voluntary; that is, regulated handlers would be required to put their restricted percentages of tart cherries in Board-controlled reserve storage unless they chose to destroy or otherwise divert them.



inventory reserve as to fulfill the "optimum supply." Id. at § 930.50(j).<sup>8/</sup>

The order establishes a maximum volume limitation for the primary inventory reserve of 50 million pounds. Id. at 930.50(i). If the primary inventory reserve reached that limit, handlers would be required to fulfill their restricted percentage requirements by diverting the restricted cherries or by placing them in a secondary reserve. Id. at §§ 930.57, 930.59(a).<sup>2/</sup> As a practical matter, however, a secondary inventory reserve would be so costly to growers that it would not be used. Morrison tr. 1529; see also Johnston tr. 1192, 1263-66 (describing the secondary reserve as a potential

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<sup>8/</sup> There are three other release mechanisms in the proposed order, id. at §§ 930.50 (f), (g), 930.54(a), but their cumbersome provisions as well as growers' and handlers' penchant for higher prices all but ensure they will not be used by the Board or by handlers to free tart cherries from the inventory reserve. See Johnston tr. 87, 89, 673-75, 681, 953-61.

<sup>2/</sup> Other than to assure that any additional cherries are destroyed rather than stored for future release, the cap serves no purpose. Proponents never did explain the primary inventory reserve cap or why the cap should be set at 50 million pounds. When these questions were put to C. Richard Johnston, the principal witness for proponents of the proposed marketing order, all he could say was "it was imperative to cap the . . . reserve so that it did not get out of hand," and that "50 million was about the right number." Johnston tr. 660. When pressed, Mr. Johnston added only that: "if you get 75 million [pounds of tart cherries in the primary reserve] you've got deep, deep trouble." Id. at tr. 660-61; see also tr. 154.

"nightmare").<sup>10/</sup> The only realistic option would be to "divert" cherries that did not qualify for the primary reserve out of the stream of commerce.

Although the proposed order suggests that "diversion" may take several forms, the record demonstrates that diversion is, for all practical purposes, a euphemism for destroying crop at the handlers' facilities. Kenneth Morrison of Cherry Growers, Inc., one of the largest processors of tart cherries in the United States, explained that destroying the crop would be the most economical form of diversion. Morrison tr. 1528-32. Michael Rowley made the same point when he said, "I think my company would probably choose to destroy cherries rather than to store cherries in a reserve pool." Tr. 1747.

Hence the proposed order mandates some storage, but also ensures that a substantial portion of the tart cherry supply would be destroyed. Indeed, proponents admit as much in their exhibit 8 at 31, the last column of which demonstrates that the Board would have mandated the diversion (and therefore destruction) of some 95 million pounds of tart cherries during the years 1987-1993 if the proposed order had been in effect during that period of time. As we explain throughout the

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<sup>10/</sup> The proposed order reimburses handlers for primary storage but requires them to pay for secondary storage even though the Board maintains control over the release of tart cherries from the secondary pool. Johnston tr. 907, 1180-81.

remainder of this memorandum, the order-induced destruction of so many tart cherries is harmful to producers, consumers, and society as a whole.

II. In Evaluating the Proposed Marketing Order the Secretary Should Balance the Interests of Growers With the Public Interest, Including the Interests of Consumers and Society

The Secretary's determination whether the order would effectuate the purposes of the Agricultural Marketing Agreement Act, as amended, 7 U.S.C. § 601-24 (the "Act"), should include an evaluation of the potential economic impact of the proposed order on growers, consumers, and the public as a whole.

Although the general purposes section of the Act, 7 U.S.C. § 602 (1988), indicates that the principal purpose of the Act is to benefit producers, see Block v. Community Nutrition Institute, 467. U.S. 340, 346 (1984), it also refers to the interests of consumers and the public. In subsections (2) and (4), Congress declared its policy to be:

\* \* \* \*

(2) To protect the interest of the consumer by  
(a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing

no action under this chapter which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

\* \* \* \*

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.

7 U.S.C. § 602(2),(4) (emphasis added).

The general policies section thus clarifies that the Act is designed to protect producers and to balance their interests with those of consumers and the public. It follows that the Secretary should carefully consider all of the costs and benefits associated with proposed agricultural programs, adopting only those programs that prove to be beneficial to society as a whole.

The Secretary's obligations under the Act are not unique. Competitive considerations, including most significantly the efficient allocation of resources, are generally considered to be subsumed in the "public interest standard" that qualifies

many federal regulatory programs.<sup>11/</sup> Indeed, the Secretary has announced that his goals in administering fruit and vegetable marketing orders must "be consistent with the efficient use of the nation's resources in the interests of producers and the general public." U.S. Department of Agriculture, Guidelines for Fruit, Vegetable and Specialty Crop Marketing Orders at 2 (1982).

These commendable goals are consistent with Executive Order 12,866, signed by President Clinton on September 11, 1993, which explains how federal agencies must review their regulatory programs.<sup>12/</sup> Executive Order No. 12,866, 58 Fed.

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<sup>11/</sup> Paragon Cable Television, Inc. v. FCC, 822 F.2d 152, 154 (D.C. Cir. 1987), United States v. FCC, 652 F.2d 72, 88 (D.C. Cir. 1980); Sabin v. Butz, 515 F.2d 1061, 1069 (10th Cir. 1975); Democratic Central Committee of D.C. v. Washington Metropolitan Area Transit Commission, 485 F.2d 886, 906 (D.C. Cir. 1973), cert. denied, 415 U.S. 935 (1974); Woods Exploration and Producing Co. v. Aluminum Co. of America, 438 F.2d 1286, 1302 (5th Cir. 1971), cert. denied, 404 U.S. 1047; Cities of Statesville v. Atomic Energy Commission, 441 F.2d 962, 987 (D.C. Cir. 1969).

<sup>12/</sup> These goals are also consistent with Block v. Community Nutrition Institute, supra, the Supreme Court's most recent opinion interpreting the Act. In that case, the Court held that consumers may not obtain judicial review of milk marketing orders issued by the Secretary under the authority of the Act. 467 U.S. at 341. But the Court also noted that when Congress enacted this legislation it was mindful of consumers' concerns and their interests in obtaining reliable supplies of agricultural commodities at competitive prices. Id. at 345-53.

Reg. 51,735 (1993), 5 U.S.C. § 601 (1993). The preamble of the Executive Order provides:

The American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and private markets are the best engine for economic growth; regulatory approaches that respect the role of State, local and tribal governments; and regulations that are effective, consistent, sensible, and understandable.

Section 1(a) of the Executive Order provides:

In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating.... Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

Although Executive Order 12,866 does not control this proceeding, see Exhibit 1 at 63,108, the rationale for it applies here: i.e., agencies should seek to achieve their goals in ways that cause the least disruption to the market system.

### III. The Proposed Order Would Harm the Public Interest

As has been shown above, the general policies section of the Agricultural Marketing Agreement Act requires the Secretary to balance the interests of producers with those of consumers and the public in determining whether to supplant the free market with intrusive government regulations. The volume controls contained in the proposed order are unnecessary, would impose clear costs on consumers and society as a whole, and would fail to provide any offsetting long-run benefits to growers.

#### A. The Tart Cherry Industry is a Competitive Marketplace That Does not Require Regulation

The single most important fact established by this record is that there is no market failure that would justify regulation. The only legitimate reason for government interference with the free market is to correct a clear market failure. Bodisch tr. 1921-22. But proponents were unable to offer proof of any clear market failure in the tart cherry industry that might be addressed by regulation.

The record shows the tart cherry industry to be competitively structured. Approximately 1,571 commercial growers produce almost all of the domestic tart cherry supply on 48,454 bearing acres of land in Michigan, Utah, New York, Oregon, Pennsylvania, Washington, and Wisconsin, the seven

states that would be covered by the proposed marketing agreement and order. Exhibit 8 at 9.13/ As the sheer number of growers suggests, entry into tart cherry industry production is relatively easy. See Johnston tr. 72 ("the creation of a more . . . remunerative [tart cherry] market would encourage other states to increase their plantings and production"); Ricks tr. 493 (high prices for tart cherries in the past "stimulated a lot of new plantings in various states"); Bodisch tr. 1919-21. In addition, information about current market conditions is readily available and rapidly disseminated to growers. See Johnston tr. 85, 90-91, 1613-17 (referring to USDA June Sampling Survey and Cherry Industry Statistics Program); Exhibit 9 (Annual Red Tart Cherries Crop Statistics & Market Analysis).

Taken together, these facts are strong indicia of a competitive marketplace: large numbers of producers each accounting for a small proportion of industry output, ease of entry and readily available information enabling individual

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13/ Last year, Cherry Key, Inc., by far the largest domestic grower to attend the hearing, produced 15 million pounds of tart cherries (6.25% of the domestic crop) on 1300 bearing acres (2.7% of all bearing acres). Gregory tr. 530; exhibit 8 at 31.



producers to respond to market price signals.<sup>14/</sup> It is hard to imagine a market less in need of government regulation.

In spite of this clear evidence that competition works in this market, proponents repeatedly complained about fluctuations in tart cherry prices, as if to suggest that such fluctuations are innately harmful to growers and consumers. Johnston tr. 54, 60, 65, 78. Proponents make no attempt to explain how or why they are harmed and they fail to apprehend that fluctuating prices provide valuable signals to growers and consumers by reflecting changes in market conditions over time. Compare Bodisch tr. 1919 and Green tr. 2150-51 with Johnston tr. 65. Proponents also ignore the numerous

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<sup>14/</sup> C. Richard Johnston for the proponents acknowledged that processors of tart cherries, like the growers, are "highly competitive," tr. 63, but he also made the assertion that processors must "sell against" buyers in an "oligopsonistic market." Id. 63. Mr. Johnston's remark notwithstanding, there was no persuasive evidence submitted in the record to suggest that buyers of processed tart cherries are oligopsonists. Indeed, Mr. Johnston admitted on cross examination that he did not know what percentage of all tart cherries grown in the United States are bought by the largest three, five, eight, or ten buyers, id. at 2011-13, and that his direct testimony on this point was essentially speculation. Id. at 2012. The only other relevant record evidence demonstrates that buyers of processed tart cherries do not operate in an oligopsony. Guise tr. 870-73, 877-78 (there are many buyers of processed tart cherries); Bodisch tr. 1887-90.

mechanisms that the market already provides to growers and handlers to hedge against fluctuating tart cherry prices to the extent each desires.

Handlers may substantially reduce the risks they face from fluctuating prices by making use of private storage. Since most tart cherries are processed, they are more readily storable than many other crops. Johnston tr. 54, 78. Therefore, handlers can and do reduce their risk by storing low-priced tart cherries for sale in the future when prices are higher. Bodisch tr. 1867-68.

Donald Gregory testified that for each of the past two years he has participated in a voluntary storage program by setting aside a predetermined percentage of his crop, intending to sell the stored tonnage in a later year at a higher price. Gregory tr. 533, 540-42. Mr. Gregory also testified that he has heard of other processors and growers who have adopted similar voluntary storage programs. Id. Mr. Gregory's testimony demonstrates that growers and processors are willing and able to make their own decisions on whether to store tart cherries for future years without being forced to do so by an

industry administrative board.<sup>15/</sup> Indeed, carryin stocks or inventories, which are a measure of voluntary storage, have been quite substantial since the previous marketing order was terminated. Exhibit 9 at 8-9; see also Bodisch tr. 1933, 1943-45.

Moreover, buyers, as well as growers and processors, routinely store tart cherries to protect themselves against fluctuating prices. Schilperoort tr. 1812, 1822-23; Bodisch tr. 1867; Schrepel tr. 2306-07, 2313-17. Mr. Johnston himself recognized voluntary storage by buyers as an effective means to reduce risk, referring to tart cherries stored by buyers as if they were "deliberately banked." Johnston tr. 665, 954, 1618-20; see also Guise tr. 850-51.

Growers can also reduce risk through diversification into other crops. Bodisch tr. 1868. "[D]iversification, by definition, makes returns more stable than they would otherwise be." Bodisch tr. 1947. Many tart cherry growers who testified

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<sup>15/</sup> While Mr. Gregory may have been dissatisfied with the results of his storage program, his dissatisfaction in no way diminishes private storage as an effective risk-reducing mechanism. Mr. Gregory's primary complaint at the hearing was that the participants in his storage program did not have sufficient market power to raise tart cherry prices above competitive levels. See Gregory tr. 1966-67, 1970-71. Mr. Johnston appears to view storage in much the same way as Mr. Gregory: "While a few gamblers among the processor community have attempted this course of action [voluntary storage], the hard fact is that no single processor controls a sufficient amount of the crop to materially impact the market in a year of a production surge." Johnston tr. 70.

at the hearing already are highly diversified.<sup>16/</sup> Indeed, it is unusual to find a grower whose only crop is tart cherries, and those who choose not to diversify may be comfortable with the risk they face. See, e.g., Thurber tr. 1009-11 (looks at tart cherries as his speculative crop).<sup>17/</sup>

Growers and processors may further reduce their risks by entering into long-term contracts with buyers, pursuant to which price is set fully or partially in advance of harvest.

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<sup>16/</sup> Walker tr. 206-08, 220; Stover tr. 238-39, 832; Seaquist tr. 350; Dittmer tr. 359-60; Hackert tr. 407; LaCross tr. 527-28; Gregory tr. 530-31 (also grows apples and sweet cherries), 546 (large processing operation), 1982-83 (even manufactures frost protection systems); Maitland tr. 550; Bittner tr. 816; Kimyon tr. 830-32; Weiser tr. 838-39; Guise tr. 863; Lamont tr. 927-28; Sievert tr. 998; Kirby tr. 1005-06; Thurber tr. 1009-10; P. Rowley tr. 1038-39, 1047; Greenhalgh tr. 1055, 1059; D. McMullin tr. 1063-64, 1067 (diversification has protected his farm from fluctuations in tart cherry prices); Kunzler tr. 1072-73; Openshaw tr. 1097, 1101; Muir tr. 1104, 1109; R. McMullin tr. 1146-48; Allred tr. 1160, 1184; Thorne tr. 1162-64, 1168; Nelson tr. 1173; Ercanbrack tr. 1221; Meredith tr. 1232-33; Dorsing tr. 1307; Brateng tr. 1399; Hawkins tr. 1487; M. Rowley tr. 1730; Fulleton tr. 2199; Heikes tr. 2281-84; Schrepel tr. 2302-03, 2307, 2399.

<sup>17/</sup> Some growers are part-time farmers for whom risk is likely less of a concern. See Bodisch tr. 1935-36; see also, e.g., P. Rowley tr. 1043-44 ("I teach school. . . . If we could see better prices in the industry, it would allow me to spend more time [working on the farm]."; Greenhalgh tr. 1055 ("I am a [full time] research metallurgical engineer for Kenicot [sic] Corporation."); Openshaw tr. 1101 ("[W]e have a long heritage in the horticulture business, but we've always been part timers at it. . . . My dad is involved. He's a school superintendent here in the state of Utah, and I also teach in this state."); Kunzler tr. 1070 (recently retired from his full-time job); Thorne tr. 1164 ("I do practice law as . . . a primary job.")

In this way, growers may effectively transfer risk of low prices at harvest time to their buyers.<sup>18/</sup> Such contracts offer buyers, growers, and handlers the price stability necessary for them to go out and develop new uses for their tart cherry products. Dorsing tr. at 1314-15, 1356-58, 1384-85.

Finally, frost control systems are a very significant risk-reducing mechanism. Compare Johnston tr. 65 ("This short-term variation [in supply] is almost wholly attributable to climatic factors. . . .") with Fulleton tr. 2200 (frost control has "all but eliminated the risk of loss due to frost" in eastern Washington). Growers can use wind machines, smudge pots, metabolic frost protectants, and sprinklers to reduce risk by protecting their tart cherries when they are most vulnerable in early spring. C. Rowley tr. 1767-68; Gregory tr. 1981; Fulleton tr. 2200-01. By tempering the frost, "[t]hese

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<sup>18/</sup> For example, Washington tart cherry grower Terry Dorsing testified: "We are now setting up with some of our customers . . . [multi-year] contracts . . . that will take some of the highs and the low swings out of [cherry prices], so that they can develop markets and develop new products. . . ." Dorsing tr. 1314-15. Mr. Dorsing and his buyer specify a tart cherry price in their contract, and then they calculate their price for the year as the average of the specified price and the prevailing market price for that year, in effect, splitting the risks of price fluctuations between buyer and seller. See id. at tr. 1357-58.

devices help to insure the stability of supply." Fulleton tr. 2200-01. On this point, Washington tart cherry grower Jim Fulleton testified:

"I read, I think in Dick Johnston's testimony (Exhibit 8 at 14), he concluded by saying they didn't have any control over the climate. Well, apparently they didn't have wind machines, metabolic frost protectants, smudge pots, or irrigation systems designed to increase the survivability of fruit in spring - in spring frosts. But they have that power. And that's a good point. That's an opportunity that they should investigate in their research to see the cost-effectiveness of investing in frost protection systems to mitigate this wild fluctuation that they characterize. They don't need... a marketing order. They need some machinery and some creative thoughts."

Fulleton tr. 2227; cf. Johnston tr. 78 ("In 1991, growers in southern Michigan lost their entire crop due to frost...").

Each of the foregoing market mechanisms permits producers to choose the level of risk they prefer. These mechanisms are far superior to government regulation for reducing risk because they are less costly, more flexible, and help producers deal with variation in prices without artificially inflating prices. See Bodisch tr. 1867. This is significant because price changes provide market signals that induce growers to shift resources to their most valued use in response to changes in underlying market conditions. Ricks tr. 493-94; Meredith tr. 1232; Green tr. 2150-51; see also Kirby tr. 1002-03; Robert

Rowley tr. 1081; Dorsing tr. 1380; Hawkins tr. 1508, 1517; M. Rowley tr. 1733. The proposed order, by tampering with the crucial role of price changes, would interfere with the efficient allocation of resources. See Bodisch tr. 1861-63, 1870.

B. The Proposed Marketing Order Would Not Stabilize Tart Cherry Prices or Supply

Proponents argue that the proposed order would be beneficial as a method to "stabilize" tart cherry prices by stabilizing the supply. See, e.g., Johnston tr. 79. Proponents' proof on this point fails. The proposed order would simply suppress supply, even in short crop years, and cause price spikes to be higher than they would be in an unregulated market.

The proponents offered testimony by thirty-two cherry growers and processors to try to show that the proposed order would stabilize both cherry supplies and cherry prices. While many of these growers and processors said, in substance, that they expect the proposed order would "stabilize" the tart cherry industry, their stated expectations are not a substitute for proof on the issue of stability. None offered any plausible explanation as to how the proponents could use the

proposed order to achieve stability.<sup>19/</sup> And, of course, other growers and processors said that they did not expect the proposed order to stabilize tart cherry markets. Dorsing tr. 1356-58; Brateng tr. 1397; Schrepel tr. 2317-18; Walker tr. 2461-62.

Proponents may rely on the testimony of Dr. Donald Ricks, a faculty member in the Department of Agricultural Economics at Michigan State University. Dr. Ricks was of the opinion that a Cherry Industry Administrative Board could reduce price fluctuations "somewhat" by storing cherries in inventory reserves in years of substantial surpluses, and then by putting

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<sup>19/</sup> Proponents' grower testimony was consistently conclusory and speculative: Stover tr. 233; Smeltzer tr. 243 (the proposed order "should bring us an orderly marketing of this cherry crop"); Bradford tr. 284-304; Pugsley tr. 317 (the proposed order "is designed to maintain a stable supply of high-quality product"); Seaquist tr. 337-38; Dittmer tr. 353-54; Hackert tr. 425-28; LaCross tr. 515; Lister tr. 552; Nye tr. 562-63 (the proposed order will "balance long-term supply and demand"); Veliquette tr. 569; Bittner tr. 818; Guise tr. 873 ("I think you are going to even out the long and the short crops"); Lamont tr. 926; P. Rowley tr. 1039-40; Greenhalgh tr. 1053; D. McMullin tr. 1064; Kunzler tr. 1071; Robert Rowley tr. 1080-81; Ray Rowley tr. 1086-87; Openshaw tr. 1098; Muir tr. 1111; R. McMullin tr. 1148; Allred tr. 1161; Thorne tr. 1165-68; Nelson tr. 1176 (the proposed order "appears to me to be hope for more stable . . . prices"); Ercanbrack tr. 1220; Farley tr. 1228; Meredith tr. 1232 ("I'm in favor of the Marketing Order if it will stabilize prices."); Hawkins tr. 1473 ("We view this order . . . as a way to help take the hills and the valleys out of the tart cherry marketing."); Morrison tr. 1543; Muir tr. 1839 ("It is hoped that the . . . order will provide the mechanisms to reach [stability and more dependable revenue]."); Gregory tr. 1976-79.



them back on the market in short crop years. See Ricks tr. 476; See also tr. 464-99. But Dr. Ricks did not endorse diversion programs or caps on inventory reserves. He also acknowledged that he was not familiar with many of the order's "nuances," such as how the Board would calculate restricted percentages or when the Board would be required to release tart cherries from the inventory reserve. See id. at 466, 470, 475, 483. Thus, Dr. Ricks's opinion is supported by nothing more than wishful thinking. If Dr. Ricks has no idea how many tart cherries the Board would put into storage or when or if the Board would put those tart cherries back on the market, he could not possibly determine whether the Board would likely use mandatory storage to reduce annual fluctuations in the tart cherry supply. Because he did not analyze the Board's optimum supply decisions under the proposed order, Dr. Ricks's testimony on this issue of stability is entitled to no weight.20/

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20/ Proponents may also rely on exhibit 8 at 37, estimated grower prices derived from Dr. Davis' regression analysis. However, forecasting from a regression equation, by definition, assumes away all variation in prices that is not "explained" by the model. See Davis tr. 612-20 (on cross-examination). Thus, no conclusions can be drawn from comparing the stability of actual market prices with the stability of forecasted prices generated from a regression equation.

Proponents' central proof on stability rests on the testimony of Mr. Johnston, managing director of the Cherry Marketing Institute and principal witness for the proponents. Mr. Johnston testified that the proposed order would "even out the supply by establishing set asides through restricted tonnage in those years when production exceeded reasonable market absorption." Johnston tr. 79. According to Mr. Johnston, the Board's judicious use of these set asides "would insure availability of product in years of shortage for all major market uses which would mitigate price fluctuations and increase market development opportunities." Id. at 80. To prove his point, Mr. Johnston sought to demonstrate how the proposed marketing order would have worked to stabilize the tart cherry supply if it had been in place since 1987, after termination of the previous marketing order. Id. at 83; exhibit 8 at 31.

In fact, exhibit 8 at 31 tells us that if the proposed order were in effect in 1987, the Board would have established a restricted percentage such that handlers would have had to place 50 million pounds of tart cherries in inventory reserve and then "divert" another 64 million pounds out of the stream

of commerce.<sup>21/</sup> This means that the Board would have taken some 41% of the tart cherry crop off the market in its first year of operation. Johnston tr. 740-41. The Board also would have mandated diversion in 1992 and 1993. Exhibit 8 at 31. Mr. Johnston recited these numbers at the hearing as proof that the proposed order "would have created a more orderly supply." Johnston tr. 84. To the contrary, these and other of Mr. Johnston's numbers prove that the proposed order actually would have destabilized the tart cherry supply during that seven-year period.

The numbers in the table below were extracted or derived from proponents' exhibit 8. The table itself demonstrates that the proposed order cannot possibly stabilize the tart cherry supply by evening out both "peaks" and "valleys" because the tart cherry supply under the order would always have been less than the actual supply available under free market conditions every year since 1987, even in short crop years. Rather than help prevent the "valleys" in supply, the proposed order would have made them deeper and therefore, made the price "peaks" even higher.

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<sup>21/</sup> These "diverted" tart cherries are in addition to the 72 million pounds of tart cherries that growers abandoned in 1987 due to storm damage. Johnston tr. 1610, 2030.

# Supply Reduction Under the Proposed Order, 1987-1993

| <u>Crop Year</u> | <u>Actual Tart<br/>Cherry Supply</u> | <u>Proponents' Estimate<br/>of Tart Cherry Supply<br/>with a Marketing<br/>Order in Place</u> | <u>Supply<br/>Reduction<br/>Under the<br/>Proposed Order</u> |
|------------------|--------------------------------------|-----------------------------------------------------------------------------------------------|--------------------------------------------------------------|
| 1987             | 356 22/                              | 242                                                                                           | 114                                                          |
| 1988             | 316                                  | 264 *                                                                                         | 52                                                           |
| 1989             | 302                                  | 276 *                                                                                         | 26                                                           |
| 1990             | 261                                  | 232 *                                                                                         | 29                                                           |
| 1991             | 212                                  | 196                                                                                           | 16                                                           |
| 1992             | 322                                  | 243                                                                                           | 79                                                           |
| 1993             | 299                                  | 250                                                                                           | 49                                                           |

\* Includes tart cherries that the Board would have released in 1988 (16 million lbs.), 1989 (20 million lbs.) and 1990 (14 million lbs.). Johnston tr. 161-62.

The numbers in the second column of the table, extracted from exhibit 8 at 17, reflect the actual tart cherry supply (in millions of pounds) in the past seven years. The numbers in the third column, extracted from exhibit 8 at 31, reflect proponents' best estimate of the tart cherry supply for the past seven years had the proposed order been in effect during that time period. Johnston tr. 83, 161-62. The fourth column, as the difference between the second and third columns, reflects the reduction in supply that would have occurred had the proposed order been in place over the last seven years.

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22/ Exhibit 8 at 17 incorrectly states that the 1987 Actual Supply (without the proposed order) would have been 256 million pounds. The correct quantity of 356, along with the 114 million pounds of cherries taken off the market by the order in 1987 (50 million set aside and 64 million diverted), can be found in Exhibit 8 at 31. Mr. Johnston pointed out at the Michigan session of these hearings that Exhibit 8 contains several similar typographical errors. Johnston tr. 739-41.

As the table demonstrates, under the order the tart cherry supply would have been lower in each of the past seven years. Rather than evening out the highs and the lows in the production cycle, the Board simply would have restricted the tart cherry supply every year, regardless of whether the tart cherry crop was very large, large, medium-sized, or small. Any argument that the Board, by occasionally releasing tart cherries, ensures that more tart cherries are available in short crop years does not square with proponents' own evidence. As shown in the table, more tart cherries were available to consumers in the free market in 1988, 1989 and 1990 than would have been available in the regulated market, even though the Board would have released tart cherries in all three of these years.

This propensity by the Board to continuously restrict the tart cherry supply, even in short crop years, will inevitably destabilize tart cherry markets. By restricting the supply, the Board will all but ensure that there will not be enough tart cherries in storage for growers and handlers to draw upon in short crop years.

Consider, for example, the 1991 short crop year, in which prices were 48¢ per pound compared to 18¢ per pound in 1990 and 17.6¢ per pound in 1992. Exhibit 8 at 17. In the free market with no order-mandated inventory reserves, handlers and growers started off with 26 million pounds in carryin inventory, reflecting voluntary storage. Exhibit 9 at 9; Johnston tr.

1604-07. By year end, they had drawn down that inventory to 18 million pounds. Id. This 8 million pound free market draw-down is significant because it demonstrates that handlers and growers, by drawing upon tart cherries in voluntary storage, sold more tart cherries than were produced in the short-crop year of 1991. Mr. Johnston recognized the stabilizing effect: "Without that draw-down, the [1991] price would have been a little higher." Johnston tr. 1611-12. In other words, growers and handlers were able to draw upon tart cherries in voluntary storage to reduce prices somewhat in the short crop year of 1991 and thereby moderate the fluctuation in prices.

Had the order been in effect, however, the situation would have been quite different. By proponents' own estimate, there would have been no tart cherries in the primary reserve and too few cherries in the carryin inventory for growers and handlers to draw down during 1991.<sup>23/</sup> Exhibit 8 at 31; see also, Johnston tr. 1603-04. Without any inventory reserve for handlers and growers to draw down, the already high 1991 tart cherry price of 48¢ per pound would have been higher yet. In

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<sup>23/</sup> The inventory reserve would have been exhausted and the carryin inventory too low in 1991 because the Board, in applying the optimum supply formula in 1987, would have capped the primary reserve at 50 million pounds and required handlers to destroy or otherwise "divert" some 64 million pounds of tart cherries. Exhibit 8 at 31. By having so many tart cherries destroyed in 1987, the Board would have ensured the depletion by 1991 of the primary inventory.

other words, the proposed order would have further accentuated the price spike in the short crop year, and hence the order, in that way, would have destabilized tart cherry prices. And if the proposed order does not stabilize tart cherry prices, any benefits to growers and society from reduced uncertainty will not materialize.

C. The Proposed Order Would Not  
Benefit Growers in the Long-Run

It is elementary economics that to the extent that the Cherry Industry Administrative Board can restrict the total quantity of tart cherries marketed below the quantity that would be marketed in an unregulated market, prices to consumers will rise and growers' profit margins will increase above competitive levels. Bodisch tr. 1861-64. Thus the proposed order's mandatory inventory reserves and diversion programs would permit growers to enhance returns, at least in the short-run, by extracting excessive payments from consumers.<sup>24/</sup>

Growers' higher returns would last only as long as the Board could hold the tart cherry supply below that produced in an unregulated market. We can expect growers' gains to

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<sup>24/</sup> This brings into clear focus the true purpose of the proposed order's mandated storage -- artificially high prices for growers at the expense of consumers and society as a whole. See, e.g., P. Rowley tr. 1045; Greenhalgh tr. 1057; Thorne tr. 1166; Farley tr. 1228; Hawkins tr. 1473, 1504; M. Rowley tr. 1730; C. Rowley tr. 1773; Gregory tr. 1971, 1979.

dissipate because the false signal of higher prices would induce additional supply of tart cherries, Bodisch tr. 1861-62, 1864-65, 1899-1900; Green tr. 2135, 2150-52; Dorsing tr. 1388-89, rapidly eroding growers' returns. To maintain high prices in the face of increased supply, the Board would be required to destroy even more cherries, thus compounding the economic waste, continuing the harm to consumers, but failing to sustain higher grower profits.

The additional cherry supply could come from a variety of sources, even if, as proponents assert, land suitable for tart cherry production is scarce in some parts of the country. See Johnston tr. 1707-10. As Mr. Green observed at tr. 2150-51: "There's always . . . a potential for expansion in agricultural industries . . . . If those price signals, or if those expected returns are changed, then a reallocation of resources may occur." Tart cherry growers may expand their production by replacing more cherry trees than usual at the end of their production cycle, or they may switch land and resources away from other crops and into the production of tart cherries. Johnston tr. 72 ("the creation of a more orderly and remunerative market would encourage other states to increase their plantings and production"); Ricks tr. 493 ("high prices . . . stimulated a lot of new plantings" when the previous order was in effect); Bodisch tr. 1865; Schrepel tr. 2351-53; Walker tr. 2461. Growers of other crops who are not currently growing tart cherries may also switch some or all of their resources



into the production of tart cherries. Id. Likewise, higher prices would encourage foreign suppliers to ship more of their tart cherries into the United States. Green tr. 2156-57; see also Ricks tr. 468-69; Meduri tr. 1422-24; Schrepel tr. 2328-29, 2353-54.

The proposed order could actually harm growers by injecting uncertainty into their markets. Every summer, as the Board attempts to achieve what it terms an "optimum supply," it is bound to generate confusion just by publicizing its preliminary, interim, and final percentages. Moreover, handlers are prohibited from marketing their restricted percentage of tart cherries, exhibit 37 at 930.54(a), but the Board need not compute and recommend final restricted percentages to the Secretary until September 15 of each crop year -- well after handlers must make their marketing decisions. Exhibit 37 at § 930.50(d). As a practical matter, if the Secretary fixes the restricted percentages on or after September 15, then handlers and growers might as well add the nature of Board actions to frost, storms, disease, and other unpredictable factors that they must face in the marketplace. See Morrison tr. 1529-30, 1552-53; Bodisch tr. 1868; Fullerton tr. 2255; Schrepel tr. 2381.

Terry Dorsing, a Washington grower, testified, "I do not understand how you make an industry healthy by restricting supply." Dorsing tr. 1293. Mr. Dorsing explained how the proposed order's complicated regulations would generate

confusion, inevitably forcing him to renege on sales contracts. Id. at 1292-93, 1295-98. He also objected to the requirement that he set aside crop that he could otherwise sell to new customers in the United States and abroad. See id. at 1295-96. Messrs. Walker, Palmquist, Fulleton and Schrepel, speaking for the majority of the growers and handlers in the States of Oregon and Washington, echoed many of the same concerns. Walker tr. 194-99, 2452-62; Palmquist tr. 1717-18; Fulleton tr. 2198-99, 2209-17, 2254-56; Schrepel tr. 2301-02, 2322-23, 2346-48, 2351-56, 2434-35.

Handlers who sell any portion of their crop before September 15 are gambling that they have not sold their restricted percentage of tart cherries. As Mr. Morrison explained, losing that gamble by underestimating the crop size could be a costly experience:

I think . . . it makes it very hard to market if you do not know what you have to sell until the 15th of September. And I think it is also harmful to the handler and the grower if we do underestimate the crops -- and we have a very strong history of underestimating cherry crops -- that we could end up with growers thinking that they diverted the proper amount on the ground, and could come back and say, "Well, you got to -- we made a mistake; you got to put 10 percent in the pool."

And even though this is a handler pool, I think we should all understand that the handlers will deduct all these costs we're talking about from the grower. And if a grower is on a down payment like he is with us, that could really hamper his cash flow.

Morrison tr. 1552-53; see also Johnston tr. 965; Hawkins tr. 1483. Handlers who overestimate the crop and divert too many tart cherries would not be much better off. They might be able to recover their diverted tonnage in the form of diversion certificates, exhibit 37 at § 930.58(b)(2), but they could only redeem those certificates in future years at a discounted rate. Hawkins tr. 1482-84; Schrepel tr. 2322-23.

D. The Proposed Order Would Harm Consumers and Society

The public harm of the proposed order flows from the order-induced restrictions on the tart cherry supply available for sale and from the destruction of a significant percentage of the crop. In a regulated tart cherry industry where mandatory inventory reserves and diversion programs restrict the tart cherry supply, consumers will suffer higher prices that follow from the reduction in tart cherries put on the market. By proponents' own estimate, revenues to growers, or conversely, payments by cherry consumers to cherry producers would have been higher by \$157.8 million had the proposed order

been in effect since 1987.<sup>25/</sup> Since all stages of the production process are competitive, the full \$157.8 million in overcharges would pass from processors to food manufacturers to the ultimate consumers. Bodisch tr. 1911-16; see also Meduri tr. 1448-49; Bodisch tr. 1864, 1878-79; Schrepel tr. 2355-56.<sup>26/</sup>

Higher prices mean that consumers will purchase fewer tart cherries in the regulated market than they would purchase in an unregulated market. They, and society as a whole, are short-changed, because although the value consumers place on additional tart cherries exceeds the cost to growers of producing and selling these cherries, regulation prevents these

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<sup>25/</sup> Mr. Johnston, estimated that grower prices, on average, would have increased some 30% (from 21¢ to 27¢ per pound) if the proposed order had been in effect during the past seven years. Johnston tr. 89-90; see also exhibit 8 at 17, 37. As to future crops, Mr. Johnston predicted "that the supply management provisions of the order should result in an average grower price of 30¢ per pound." Exhibit 42 (emphasis in the original).

<sup>26/</sup> The only evidence in the record to the contrary is the testimony of Mr. Johnston and Dr. Ricks, who both were of the view that the higher tart cherry prices brought on by the order would hardly impact consumers. Johnston tr. 94-95; Ricks tr. 491. Mr. Johnston assumed that consumers would not notice the higher prices. Dr. Ricks assumed that food manufacturers and retailers would absorb the higher prices. Neither of these assumptions is supported by record evidence.

mutually beneficial transactions from taking place.<sup>27/</sup> Economists refer to this loss in welfare as a "deadweight loss" because there is no corresponding benefit to anyone else in society -- consumers who stop buying tart cherries at the artificially high prices are clearly harmed, and growers make no revenue from the transactions foregone because of the higher prices.<sup>28/</sup> Moreover, society incurs great expense as the artificially high prices attract resources, better employed elsewhere, into growing tart cherries that no one wants to buy at the inflated prices and that end up being destroyed.

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<sup>27/</sup> On this point, Clarence Weeks, Continental Baking's purchaser for ingredients, expressed a concern that "volume control regulation would result in distorted signals to the marketplace" and make it more difficult for Continental to obtain supplies of the quality it needed. Bodisch tr. at 1878.

<sup>28/</sup> This "deadweight loss" is not simply a matter of economic theory. Joe Meduri, the only tart cherry buyer to appear at the hearing, testified that he would cut back or eliminate his purchases of domestic tart cherries if the order drove up tart cherry prices too high. Meduri tr. 1422-25, 1428-30, 1438-41. Representatives of Mrs. Smith's, Sara Lee, and Continental Baking who talked with Dr. Bodisch expressed their concern that the order would raise prices, distort market signals, and otherwise inject uncertainty into tart cherry markets. Bodisch tr. 1867-69, 1875-80. Sara Lee's representative described the proponents' notion that volume controls would enhance tart cherry demand, see, e.g. Johnston tr. 64, 79, as "oxymoronic." Id. at 1877-78.

#### IV. Minimum Quality Standards Can Also Harm Competition

The proposed marketing order would also authorize the Board to impose minimum quality and inspection requirements on handlers. Exhibit 37 at § 930.44. If the Board, with the approval of the Secretary, chose to impose such requirements, no handler could process tart cherries into manufactured products or sell the manufactured products unless the tart cherries used in such products were inspected and then certified in a manner acceptable to the Board. *Id.* The proposed order provides no details as to what criteria, either economic or administrative, the Board would use when deciding whether and how to impose minimum quality and inspection requirements.

The Secretary should deny proponents' request for authority to impose quality control provisions because there is no evidence in the record that the current free market in tart cherries has given rise to quality problems. Moreover, to the extent that quality standards for tart cherries may serve some useful purposes, the Secretary has already promulgated numerous voluntary standards for minimum grades of tart cherries. *See, e.g.,* 7 C.F.R. §§ 52.771-84, 52.801-12 (1993).

The record demonstrates that government-mandated quality controls are unnecessary because tart cherry growers, handlers, and buyers, acting in their own self interest in the

unregulated marketplace, are fully capable of ensuring the optimal quality of their tart cherry products. "[M]any buyers now insist on and, in many cases, pay for higher quality fruit." Johnston tr. 95. Tart cherry buyers voluntarily set high standards because they have a sophisticated understanding of quality and the incentive to monitor quality closely to protect their reputations. Bodisch tr. 1869-70. Buyers' concern for their own reputations therefore ensures that high-quality products are made available to the ultimate consumer without the need for order-mandated quality standards. Id.; Schrepel tr. 2331; see also Dorsing tr. 1361-62 (new buyers do a whole battery of tests on tart cherry samples, and therefore know exactly what they are buying); Farley tr. 1229; Green tr. 2132-34, 2170-73.

Of course growers and handlers are also concerned about quality control, and they take great pains to meet the quality demands of their customers. Oregon grower Lee Schrepel, in describing his arrangement with one of his customers, explained that the customer's quality standards prevail. Schrepel tr. 2330. Said Schrepel: "He calls and says 'These are my specs; send me a sample.' If it's what he wants, it's what he gets." Schrepel tr. 2330. Terry Dorsing, a Washington grower and handler, agreed with Schrepel that quality control is an important part of the customer-producer relationship in the tart cherry industry, Dorsing tr. 1359-60, but he went further,

expressing his concern that order-imposed quality controls might disturb or upset that relationship: "I would hate to have somebody from the outside come in and impose regulations on us that would maybe not meet . . . my needs . . . . That . . . could have a devastating effect, really." Id.; see also Green tr. 2132-34; Fulleton tr. 2229-31, 2251-53.

The cost of order-imposed quality-control inspections would be borne by tart cherry growers and handlers, some of whom could not afford to absorb such costs. Charles Palmquist of Norpac Foods, an Oregon processing cooperative, testified that Norpac would likely discontinue processing cherries rather than comply with unnecessary inspection requirements. Palmquist tr. 1719-22. The real costs of the quality controls would then fall on Norpac's grower members who depend on the cooperative to process their tart cherry crop. Id. 1724-25.

Finally, proponents may attempt to use quality control provisions as a form of anticompetitive supply control. See U.S. Department of Agriculture, Guidelines for Fruit, Vegetable, & Specialty Crop Marketing Orders at 5 (1982). Proponents may choose to change their standards from crop year to crop year in an effort indirectly to manipulate the tart cherry supply. In addition to restricting the supply and raising prices, such manipulation would create uncertainty in the tart cherry industry, thereby defeating the underlying rationale for quality controls. As Mr. Green put it at the



hearing, "[A] quality standard [that] changed year to year, would mitigate some of if not all [of the] benefits [derived from having a known standard that conveys information about product quality]." Green tr. 2173; See also id at 2132-34, 2172-73. The Secretary should not assume this risk to competition, for proponents have failed to carry their burden by proving the need for quality controls in the first instance. See Bodisch tr. 1869; Schrepel tr. 2330.

### CONCLUSION

Proponents' proposed tart cherry marketing order, with its mandatory inventory reserves and "diversion" programs, represents an unnecessary intrusion into the tart cherry industry, which is a competitive marketplace. Such regulation would permit growers to restrict the tart cherry supply and raise prices above competitive levels, thereby misallocating the economy's resources, causing deadweight loss, and harming consumers and society as a whole. At the same time, proponents have utterly failed to prove that the proposed order would offset this cost by providing growers with more stable tart cherry prices that would significantly reduce their risks. In fact, growers already have the ways and means in the unregulated market to reduce the risks they face from fluctuating tart cherry prices.

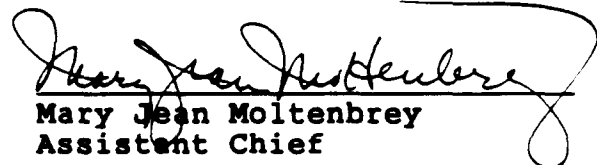
The record in this proceeding demonstrates that the proposed order is inconsistent with sound economic policy and the policies of the Agricultural Marketing Agreement Act. In the absence of any demonstrated need for intervention, where the potential benefits are so speculative, and the harm to consumers and society is so clear, the Secretary should refuse to issue proponents' proposed marketing order.

Respectfully submitted,


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## APPENDIX

Under the proposed order, the Board would meet on or about July 1 of each crop year to establish an "optimum supply" level for the crop year, calculated as 100 percent of the average sales of tart cherries the prior three years to which shall be added a desirable carryout inventory not to exceed 20 million pounds. Exhibit 37 at § 930.50(a),(h). At the same time the Board would establish a "preliminary free market tonnage percentage," calculated as the optimum supply less the "carryin inventory" (as reported by the Michigan Red Tart Cherry Growers Marketing Committee) from the previous crop year (adjusted to a raw fruit equivalent) divided by the current year USDA crop forecast. If the resulting quotient is 100 percent or more (i.e., if the optimum supply less carryin is greater than the USDA crop forecast), the Board would establish a preliminary free market tonnage percentage of 100 percent. Id. at § 930.50(b). If the quotient is less than 100 percent, the Board would establish a preliminary free market tonnage percentage equivalent to the quotient, rounded to the nearest whole percent, with the complement being the "preliminary restricted percentage." Id.

Between July 1 and September 15 of each crop year, the Board would calculate several "interim restricted percentages" by modifying the preliminary free market tonnage and restricted

percentages "to adjust to the actual pack occurring in the industry," promptly giving notice to growers and handlers of any such modifications. Id. at § 930.50(c),(h).

No later than September 15 of each crop year, the Board would review actual production during the current crop year, make such adjustments as are necessary between free and restricted tonnage to achieve optimum supply, and recommend such free market tonnage and restricted percentages to the Secretary. Id. at § 930.50(d),(h). The difference between any final free market percentage designated by the Secretary and 100 percent would be the "final restricted percentage." Id.

Restricted percentage requirements may be fulfilled by handlers by establishing a primary inventory reserve in accordance with § 930.55, by establishing a secondary reserve in accordance with § 930.57, or by diversion of production in accordance with §§ 930.58, 930.59 and 930.62. Id. at §§ 930.50(i), 930.59(b).

In years where the primary reserve is expected to reach the maximum quantity of 50 million pounds, the Board would establish a maximum percentage of the restricted quantity which may be established as a primary inventory reserve such that the total primary reserve does not exceed the 50 million pound cap. Id. at § 930.50(i). In those years, the Board would calculate three percentages: a free market percentage, a primary reserve restricted percentage, and a third percentage for cherries which must either be diverted or placed in a secondary inventory.